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No. [redacted] 82

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA, APPELLANT

v.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

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In the District Court of the United States for the Southern District of Georgia, Savannah Division

No. 9175

UNITED STATES OF AMERICA

v.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause;

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682 of the United States Code, otherwise known as the "Criminal Appeals Act," and by Section 345, Title 28 of the United States Code.

B. This cause involves the validity and construction of the Fair Labor Standards Act of 1938, 52

234162—40

Stat. 1060, U. S. C., Title 29, Section 201, *et seq.* Since various sections of this statute are involved, a copy of the Act is attached to this statement.

C. The judgment of the District Court sought to be reviewed was entered on May 6, 1940, and the petition for appeal was filed on May 13th, 1940, at the same time that this statement as to jurisdiction was filed.

D. The indictment herein consists of nineteen counts. Each count alleges that the defendant is engaged in the business of procuring, producing, manufacturing, and selling lumber, that a large part of the lumber was procured, produced, and manufactured pursuant to orders received from customers without the State of Georgia with the intent that the said lumber would be sold and shipped outside the State of Georgia, that the said lumber was sold and shipped outside the State of Georgia, and that in procuring, producing, and manufacturing the said lumber, defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 (Paragraphs 3 and 4).

Counts 1 to 3 of the indictment allege that the defendant employed named employees in the "buying, procuring, obtaining, producing, and manufacturing of * * * lumber for interstate commerce" and failed to pay the minimum wage of twenty-five cents per hour required by Sections 6 and 15 (a) (2) of the Fair Labor Standards Act. Counts 4 to 11 allege that the defendant employed

named individuals engaged in producing lumber for interstate commerce for a workweek longer than forty-four hours without paying one and one-half times the regular rate of pay for the excess hours worked over forty-four, in violation of Sections 7 and 15 (a) (2) of the Fair Labor Standards Act. Count 12 alleges that the defendant has wilfully failed to keep and preserve a record of the hours worked each day and week by persons employed, as required by Section 11 (c) of the Fair Labor Standards Act and certain regulations of the administrator issued thereunder. Counts 13 to 16 allege that the defendant did ship from a point within the State of Georgia to points in other states particular shipments of lumber, each of which defendant had cut and produced by Daniel B. Gay, knowing that in the cutting and production of such goods Gay intended that the lumber would be shipped in interstate and foreign commerce and that Gay employed in the production of said lumber employees to whom he failed to pay twenty-five cents per hour, as required by the Fair Labor Standards Act. Counts 17 to 19 allege that the defendant shipped from a point within the State of Georgia to points outside the State particular shipments of lumber manufactured and produced for interstate commerce in the production of which defendant employed employees to whom defendant failed to pay either twenty-five cents per hour or time and one-half for hours worked in excess of forty-four per week.

The defendant filed a demurrer to the indictment. The demurrer was sustained by the District Court on the ground that the Fair Labor Standards Act could not, under the commerce clause, constitutionally be applied to the production of lumber and that the Act should be construed so as to avoid its application in such circumstances.

E. The Fair Labor Standards Act applies both to the wages and hours of employees engaged in interstate commerce, and in the production of goods for such commerce. The decision below holds the Act unconstitutional insofar as it applies to the production of goods for interstate commerce. This ruling is in conflict with the decisions of six other district judges [1] and also with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Opp Cotton Mills, Inc.* v. *Administrator,* ———, decided April 2nd, 1940. The decision also invalidates the provisions of the Act prohibiting interstate shipments of goods produced under substandard labor conditions. The questions raised are obviously vital to the administration of the Fair Labor Standards Act.

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[1] *United States* v. *Walters Lumber Company,* 32 F. Supp. 65 (S. D. Fla.); *Andrews* v. *Montgomery Ward and Co.,* 30 F. Supp. 380 (N. D. Ill., Holly, J.); *United States* v. *Feature Frocks, Inc.,* Dec. 27, 1939 (N. D. Ill., Woodward, J.); *United States* v. *Chicago, Macaroni Co.,* Dec. 4, 1939 (N. D. Ill., Barnes, J.); *Wood* v. *Central Sand and Gravel Co.,* May 3, 1940 (W. D. Tenn., Martin, J.); *Bowie* v. *Claiborne,* Dec. 26, 1939 (D. C. Puerto Rico).

F. The following decisions sustain the jurisdiction of the Supreme Court upon appeal to review the judgment in this cause on the ground that said judgment is based upon the unconstitutionality and construction of the statute upon which the indictment is based:

United States v. *Hastings*, 296 U. S. 188, 192.

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304.

United States v. *Kapp*, 302 U. S. 214, 217.

United States v. *Borden Company*, 308 U. S. 188.

Appended hereto is a copy of the opinion of the District Court rendered on April 27, 1940.

Respectfully submitted.

(signed) FRANCIS BIDDLE,
Solicitor General.

(signed) J. SAXTON DANIEL,
United States Attorney.

(signed) ROBERT L. STERN,
Special Assistant to the Attorney General.

Endorsement: Indictment No. 9175, Statement as to Jurisdiction of Supreme Court. Filed in Clerk's Office: May 13, 1940. Eugene F. Edwards, Jr., Deputy Clerk.

In the District Court of the United States for the Southern District of Georgia, Savannah Division

No. 9175

UNITED STATES OF AMERICA

v.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

VIOLATIONS OF FAIR LABOR STANDARDS ACT OF 1938

WILLIAM H. BARRETT, *District Judge:*

Subsequent to the able oral arguments and the submission of thorough and exhaustive briefs in this case the Circuit Court of Appeals for the Fifth Circuit decided the case of *Opp Cotton Mills, Inc.*, v. *Administrator Wage and Hour Division, Etc.* (April 2, 1940).

In the opinion in the *Opp* case is found this language:

> We are of opinion and so hold that the enactment of the Fair Labor Standards Act was a valid exercise of the power given to Congress by the commerce clause of the federal constitution.

If such language is all-inclusive under all conditions this court is bound by such decision and will cheerfully follow the same. Apparently the Cir-

STANDARDS CHANGE OCTOBER 24
See Pages 4 & 5

[PUBLIC—No. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by repre-

sentatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to

carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended. (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original

order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*,

That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while

[PUBLIC—No. 344—76TH CONGRESS]

[CHAPTER 605—1ST SESSION]

[S. 1234]

AN ACT

To amend section 13 (a) of the Act approved June 25, 1938 (52 Stat. 1069), entitled "Fair Labor Standards Act of 1938".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 (a) of the Act approved June 25, 1938 (52 Stat. 1069), entitled the "Fair Labor Standards Act of 1938", be, and the same is hereby, amended by adding a new subsection 11 as follows: "or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations".

Approved, August 9, 1939.

Washington

MINIMUM WAGE RATES
Established By Administrative Order

HOSIERY	At least 32-1/2 cents an hour for seamless	Effective Sept. 18, 1939
	At least 40 cents an hour for full-fashioned	Effective Sept. 18, 1939
TEXTILES	At least 32-1/2 cents an hour	Effective Oct. 24, 1939
MILLINERY	At least 40 cents an hour	Effective Jan. 15, 1940
SHOES	At least 35 cents an hour	Effective April 29, 1940
KNITTED UNDERWEAR	At least 33-1/2 cents an hour	Effective May 6, 1940
KNITTED OUTERWEAR	At least 35 cents an hour	Effective July 1, 1940

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cuit Court of Appeals felt compelled to its conclusion by certain decisions of the Supreme Court of the United States. An accurate ascertainment of the scope of such language can be best revealed by a study of the cases which required it. The essential question here is: Does such decision control intrastate activities of the kind involved in the case at bar? I think not.

The cases relied upon by the Circuit Court of Appeals to compel its conclusion are as follows:

Mulford v. *Smith*, 307 U. S. 38. In this case we find this statement in headnote 2 (1):

> The statute does not purport to control production, but regulates commerce in tobacco through marketing.

Kentucky Whip & Collar Co. v. *Illinois Etc. RR.*, 299 U. S. 334. This was an exercise of the power of Congress to aid states in the enforcement of state laws.

Labor Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. In headnotes 7 and 8 of this case we find this statement of one of the principles controlling in such case:

> 7. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control.

8. This power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace would then, in view of our complex society, effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.

Currin v. *Wallace*, 306 U. S. 1. After stating the regulation we find the following in headnote 2, subheads (1), (2), (3), and (4):

(1) Such regulation, for the protection of sellers or purchasers, or both, is within the commerce power as respects the selling for transportation to other states or abroad; and in view of the manner of the selling at the auctions, where all transactions are conducted indiscriminately and virtually at the same time, Congress was authorized to apply its regulation to intrastate sales in order to make it effective as to the sales in interstate and foreign commerce.

(2) The auction is a part of the sales consummated, notwithstanding that in the market practice the growers are not bound to accept bids, and in some instances reject them.

(3) Regulations under the commerce clause may have the quality of police regulations.

(4) The inspection and grading under the Act, though they take place before the auc-

tion, have immediate relation to the sales in interstate and foreign commerce.

Santa Cruz Co. v. *Labor Board*, 303 U. S. 453. On page 454 (headnotes 6 and 7), the following principle is stated:

> (6) Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.
>
> (7) This principle is essential to the maintenance of our constitutional system.

Brooks v. *United States*, 267 U. S. 432. The extent of this decision is thus stated in headnote *1*:

> The Act punishing the transportation of stolen motor vehicles in interstate or foreign commerce is within the power of Congress.

Lottery Case (*Champion* v. *Ames, No. 2*), 188 U. S. 321. The decision arose on a habeas corpus proceeding and the extent of the decision is stated in headnote *3*, as follows:

> Legislation prohibiting the carriage of such tickets is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

Hammer v. *Dagenhart*, 247 U. S. 251. The import of this decision may be well understood from the following headnotes:

> The power to regulate interstate commerce is the power to prescribe the rule by

which the commerce is to be governed; in other words, to control the means by which it is carried on.

* * * * *

> The manufacture of goods is not commerce, nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to the control of Congress.

All except the two cases of *Brooks* v. *United States* and *Champion* v. *Ames*, above referred to, were civil cases and opportunity was afforded and used to investigate the facts connected with the alleged violations of law involved. In each case it was held that the particular facts therein authorized the law.

On June 5, 1939, the Supreme Court decided the case of *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, which also was a civil case. The particular challenge involved in such case is the regulation of "the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant." It was held that such sale could be controlled, but the principle authorizing such control is that stated in headnote *11*, page 536:

> Where milk sold by the dairy farmer locally and milk from other States are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens, and obstructions arising from excessive surplus and the social and

sanitary evils created by low prices, the power of Congress extends also to the local sales.

In the case at bar there are no charges of facts which bring the alleged violations within the ambit of which would make interstate commerce out of which is primarily intrastate activities. The controlling facts alleged which affect every charge made as to interstate commerce, is no stronger than this, namely:

> 4. At all times hereinafter referred to, a large proportion of the lumber bought, procured, obtained, produced, and manufactured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia. The said lumber was bought, procured, obtained, produced and manufactured with the intent on the part of the defendant that the said lumber after having been bought, procured, obtained, produced and manufactured would be sold, shipped, transported and delivered to and the said lumber was sold, shipped, transported and delivered to customers without the State of Georgia. In buying, procuring, obtaining, producing, and manufacturing the said lumber, the defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

There is no charge as to when the intent to ship was formed or bandoned; there is no charge that

at the time of the production there was in existence any contract making the shipment a part of interstate commerce, and even as to the indefinite charge that "a large proportion of the lumber bought, procured, obtained, produced and manufactured by the defendant was bought, procured, obtained, produced and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia" there is no charge that such orders were of such an amount or nature as to directly affect interstate commerce or to become a flow of commerce or to come within any of the other conditions which would make the production of lumber, disconnected from interstate commerce at the time of production, a part of interstate commerce and subject to control by Congress.

The indictment charges that production was complete and that sale in interstate commerce was not made until *after* the production was completed. The essential constitutional question in reference to the interstate commerce clause is as to the meaning of the language of the Act, Sec. 6:

> Every employer shall pay to each of his employees who is engaged in commerce or in the *production of goods for commerce* wages at the following rates [italics ours].

If the language "in the production of goods for commerce" be limited to production which at the time of production was directly connected with interstate commerce or was coupled with some act or

acts pertaining to and making such production a part of interstate commerce the Act is constitutional; but if the Act means, as this indictment charges, that the mere intent at the time of production that *after* production it may or will be sold in interstate commerce in part or in whole makes it a part of interstate commerce the Act is unconstitutional. See *Hammer* v. *Dagenhart, supra,* declaring that manufacture is not commerce and intent to subsequently sell in interstate commerce does not make manufacturing commerce; and *Labor Board* v. *Jones & Laughlin, supra,* declaring that intrastate activities cannot be controlled under the interstate commerce clause unless such activities have "such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions."

The indictment charges nothing more than failure to pay minimum wages in *production* of goods with *intent* that such goods *after* production was completed would be connected with interstate commerce. There are no allegations notifying the defendant that such production in intrastate activities was so connected with interstate commerce as to justify the control of Congress under the commerce clause of the constitution.

No man should be put on trial in a criminal case unless he knows definitely what is the charge against him. In the absence of such definiteness as

would justify the law under the interstate commerce clause the indictment must fall.

If Congress can under the interstate commerce clause provision of the constitution regulate state activities only when connected with interstate commerce or affecting interstate commerce in some of the ways and to the extent limited by decisions of the United States Supreme Court why should not the act of Congress so declare? Otherwise, and if the indictments are drawn similar to the one at bar, defendants would not be notified of the crimes with which they are charged. Under the interpretation of the indictment before us and of the Fair Labor Standards Act as urged by the government the regulation of labor would embrace not only (by illustration in the present case) the man who cut the timber or hauled it to the mill but also the man who planted the seed and cultivated the trees. If the interstate commerce clause carries with it such power to thus create a centralized government as against an "indestructible union composed of indestructible states" (*Texas* v. *White*, 74 U. S. 725) the sooner it is known the better. It is my opinion that Congress has not yet gone to that exent and that if it has the Act is unconstitutional. Therefore the decision in the Opp case, which dealt with a situation where investigation had been had and findings promulgated, does not apply to a case of the kind at bar.

It therefore follows that the indictment is quashed.

In view of the conclusion thus reached it is unnecessary to consider other constitutional questions that have been raised.

This 27th day of April, 1940.

(Signed) WM. H. BARRETT,
United States Judge.

Endorsement: Criminal Indictment No. 9175, Opinion Of Court upon Demurrer to Indictment. Filed in Clerk's Office at Savannah, April 30, 1940.

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